IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8110 OF 2005

M/s.Sadguru Constructions and Anr. ..Petitioners

Vs.

Smt.Jaimeet Kaur Nirmansingh Sial
and Others ..Respondents

Mr.R.M.Agrawal with Mr.G.R.Agrawal for the petitioners

Mr.R.S.Datar for respondent no.1

CORAM: S.U. KAMDAR, J.

DATE : 23RD DECEMBER, 2005

ORAL JUDGMENT

1. The present Writ Petition is filed challenging the order dt.6.10.05 passed on Ex.23 in R.C.S Suit No.1160 of 2005 by the 8th, Jt.Civil Judge, Senior Division, Pune. The said order has been passed on an application of the petitioner for a stay of the suit under section 10 of the Civil Procedure Code. Some of

the material facts of the present case which are necessary to be enumerated are as under:

2. In 1985 a firm of Satguru Construction was constituted with three partners namely Sardar Nirman Singh, Sardar Harpal Singh and Sardar Sujan Singh. The said partnership was unregistered. As per the terms and conditions of the said partnership agreement the partnership commenced w.e.f.1985. All the three partners had equal share. Under clause 14 of the said partnership it was provided that on the death of a partner partnership does not come to an end and shall be continued by the surviving partners. On 20.10.02 one of the partner Shri Nirman Singh Sial died leaving behind respondent no.1 to 4 as legal heirs. Dr.Smt.Gurucharan Kaur Nirmansingh Sial who was the wife of the deceased and mother of respondent no.1 filed a suit being RCS Suit No.220 of 2003 sometime in or about 1.2.03 before the Civil Judge Senior Division Pune. The reliefs which were sought in the said suit were that it be declared and ordered that the plaintiff should be inducted as a partner of the said firm and the second relief sought is that the defendants should be restrained from selling or entering into any

transaction relating to the property of the firm till suit is finally disposed of. Prayers in the said suit no.220 of 2003 preferred by Dr.Smt.Gurucharan Kaur Nirmansingh Sial are reproduced hereunder:

> "10.(a) It is to be declared and ordered that the plaintiff is to be inducted as a partner of the Defendant no.1 firm.
>
> (b) The Defendants permanently may be restrained from sale or any transaction relating to the suit property till the suit is finally disposed off or decided.
>
> (c) The costs of the suit may be awarded to the Plaintiff from the Defendants."

3. On 7.11.03 suit was dismissed as not maintainable because of non-registration of firm under S.69 3(A) of the Indian Partnership Act, 1932 . The first appeal was allowed holding that the said suit is maintainable. Against the said order and judgement dt.7.1.04 second appeal was filed being second appeal no. 489 of 2004. The said second appeal is admitted and is pending before this court and there is a stay of further proceedings in the suit filed by the deceased wife Dr.Smt.Gurucharan Kaur Nirmansingh Sial.

4. On 1.9.05 the present respondent no.1 filed a

suit being R.C.Suit No.1160 of 2005. The respondent no.1 is a daughter of the said Dr.Smt.Gurucharan Kaur Nirmansingh Sial and the deceased partner Nirmansingh Sial. The said suit was filed interalia for a declaration that she is entitled to 1/4th share of the deceased's interest in the said partnership firm as legal heir and representative she has also claimed that she is also entitled to accounts of the firm. The respondent no.1 has also prayed in the said suit as heir of Nirmansingh Sial that she is also entitled to partnership in the said firm and sought injunction against the co-partners for disposing of the properties of the said partnership firm. The prayers in the said suit reads as under:

> "19.(a) It be declared that plaintiff is entitled to claim share to the extent of one fourth of the total out of the share of her father.
>
> (b) That plaintiff being legal heir of the deceased Nirmansingh Sial is entitled to claim partner in the defendant no.1 firm.
>
> (c) That defendant no.1 & 2 individually or on behalf of their assignee, executors, Administration etc. be restrained by order of permanent injunction not to transfer by way of sale, agreement or any other manner or further not to improve the suit property.

(d) That defendant no.1 and 2 be directed to settle the accounts of the plaintiff after determination and justification of the same and then decreed to the extent of the share of the plaintiff be passed.

(e) The cost of the suit be awarded to the plaintiff from the defendant no.1 & 2.

(f) Such other orders as may be deemed just and proper may also be passed."

5. The petitioners after filing written statement has filed an application being Ex 23 on 1.9.05 and sought a stay of the trial of the present suit on the ground that the said suit should be stayed under the provision of section 10 of the Civil Procedure Code. On 6.10.05 the Jt.Civil Judge Senior Division Pune passed an order and judgement dismissing the said application. It is this order of the learned Civil Judge, Senior Division Pune rejecting the application under section 10 of the Civil Procedure Code which is under challenge before me.

6. The learned counsel for the petitioners has placed before me a large number of submissions in support of his argument that the suit should be stayed by exercising power under section 10 of the Civil Procedure Code. Mr.R.M.Agarwal, the learned counsel

for the petitioners has vehemently contended that in both the suits there is an identity of the subject matter and the reliefs claimed. It has been further submitted that both respondent no.1 and mother Dr.Smt.Gurucharan Kaur Nirmansingh Sial are claiming through the deceased partner Nirmansingh Sial and therefore parties in both the suits are the same. It has been contended that in both the suits the issue arises that whether in view of the bar contained under Section 69 of the Indian Partnership Act, such a suit would be barred and not maintainable. It has also been contended that both the respondent no.1 and 3 are not having their independent right and are only claiming through deceased Nirmansingh Sial in their capacity as legal heir and representatives. Thus, it is submitted that there is a complete identity of party and complete identity of subject matter. However, it is submitted that even if it is not the same since it is not a sine qua non what is required to be seen is whether they are substantially the same. The learned counsel has thereafter submitted that keeping in mind the various authorities and the decision laid down by the Apex Court and various High Courts the suit is squarely covered by the provision of section 10 and therefore

the same is liable to be stayed. It has been submitted that the object behind the enactment of the section 10 of the Civil Procedure Code is to avoid multiplicity and conflict of finding by the court of concurrent Jurisdiction and therefore the present relief ought to have been granted by the Trial Court.

7. In support of the aforesaid submissions the learned counsel for the petitioners have relied upon the judgement of the Supreme Court in the case of Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal reported in AIR 1962 SC 527 para 39 thereof which reads as under

> "39. The suit at Indore which had been instituted later, could be stayed in view of S.10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers under S.151 is not justified. The provisions of S. 10 do not become inapplicable on a Court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract. It does not appear correct to say, as has been said in Ram

> Bahadur Thakur and Co. v. Devidayal (Sales) Ltd., ILR (1954) BOM 334: (AIR 1954 Bom 176), that the Legislature did not contemplate the provisions of S.10 to apply when the previously instituted suit be held to be instituted in those circumstances. The provisions of S.35A indicate that the Legislature was aware of false or vexatious claims of defences being made, in suits, and accordingly provided for compensatory costs. The Legislature could have therefore provided for the non-application of the provisions of S.10 in those circumstances, but it did not. Further, S.22 of the Code provides for the transfer of a suit to another Court when a suit which could be instituted in any one of two or more Courts is instituted in one of such Courts. In view of the provisions of this section, it was open to the respondent to apply for the transfer of the suit at Asansol to the Indore Court and, if the suit had been transferred to the Indore Court, the two suits could have been tried together. It is clear, therefore, that the Legislature had contemplated the contingency of two suits with respect to similar reliefs being instituted and of the institution of a suit in one Court when it could also be instituted in another Court and it be preferable, for certain reasons, that the suit be tried in that other Court."

8. He has also relied upon the Judgement of the Supreme Court in the case of P.V.Shetty v. B.S.Giridhar reported in AIR 1982 SUPREME COURT 83. The relevant portion reads as under:

> "On the other hand, if the application for fixation of fair rent is allowed holding that the appellant is a tenant as understood under the Rent Act, and the fair rent is Rs.500/- or less per month he would be entitled to the

> protection of the Rent Act which determination will have impact on the suit, subject, or course, to other contentions that may be raised in the suit. Now it is an admitted position that the application for fixation of fair rent preceded the filing of this suit. Obviously, therefore, the just and fair approach, balancing the equities would be to stay further hearing of the suit till the application for fixation of fair rent is decided. But as Mr.Datar, learned counsel for the respondent, voices a serious apprehension that in that event the suit may not be decided for years. That is a recurring phenomenon in our courts and we must guard against it."

9. He has thereafter relied upon the judgement of this court in the case of Trikamdas Jethabhai and others v. Jivraj Kalianji and another reported in AIR (29) 1942 Bombay 314. The relevant portion reads as under:

> "d. Before coming to the question whether the matter in issue in this suit is directly and substantially in issue in the earlier suit, I will first deal with the question of delay in taking out this notice of motion which Mr.M.P.Amin has urged as a ground for refusing to stay this suit. It is true that the defendants in this suit filed their written statement on 11th November 1941. The plaintiffs however, did not file their reply until 23rd March 1942, although I am told that a copy of it was supplied to the defendants on or about 9th March 1942. When a motion of this character comes before the Court it is very usual for the Judge to ask to see the pleadings in both the suits in order that he may determine therefrom whether the matter in issue in the two suits is directly and

> substantially the same. I can, therefore, well understand that the defendants may have postponed taking out the notice of motion in order first to have in their hands the reply. Be that as it may, the words of S.10, Civil P.C. are mandatory and require that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit."

10. He has thereafter relied upon the judgement of the Division Bench of this court in the case of Jai Hind Iron Mart v. Tulsiram Bhagwandas reported in AIR 1953 Bombay 117. The relevant portion reads as under:

> "S.10 does not contemplate an identity of issues between the two suits, nor does it require that the matter in issue in the two suits should be entirely the same or identical. What the section requires is that the matter in issue in the two suits should be directly and substantially the same, and proper effect must be given to the language used by the Legislature in S.10 that the identity required is a substantial identity. There must be an identity of the subject-matter, the field of controversy between the parties in the two suits must also be the same, but the identity contemplated and the field of controversy contemplated should not be identical and the same in every particular, but the identity and the field of controversy must be substantially the same."

11. He has also relied upon the judgement in the case of The Laxmi Bank Ltd., Akola and Others V. Harikisan and others reported in AIR (35) 48 Nagpur

297. He has thereafter relied upon the judgement in the case of Maharashtra State Co-operative Marketing Federation Ltd, Bombay v. Indian Bank, Bombay reported in AIR 1997 Bombay 186. The relevant portion reads as under:

> "5. We have given our careful consideration to the rival submission of the counsel for the parties and perused the provisions of Section 10 of the CPC and Order XXXVII. Section 10 provides for stay of suit in the circumstances set out therein. It reads as follows:
>
> "10. Stay of suit - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.
>
> Explanation - The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."
>
> Section 10 thus mandates the Court not to proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties. The provisions of stay in this section are mandatory. The object of this section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the

> same matter in issue. Though the heading of this section is "stay of suit", it does not operate as a bar to the institution of the subsequent suit. It is only the trial of the suit that is not to be proceeded with."

12. Thereafter he has relied upon the judgement in the case of Minguel Francis D'costa Vs. Sultan Gulamali Karim and others reported in 1999 (2) Mh.L.J. 389 particularly pr 9 which reads as under:

> "9. Admittedly in this case, earlier suit was by the tenant restraining the respondent landlord from dispossessing him. This is under the provisions of the Rent Act. This is a matter pertaining to the relationship of landlord and tenant and for which City Civil Court has no jurisdiction to deal with it. The reliefs asked cannot be granted by the City Civil Court. Likewise as far as the relief sought in the subsequent suit is concerned only the City Civil Court can have jurisdiction. It cannot be said that both the suits are pending in two different courts having parallel and concurrent jurisdiction."

13. Thereafter the Division Bench Judgement of the Calcutta High Court in the case of Arun General Industries Ltd. V. Rishabh Manufacturers Private Ltd and others reported in AIR 1972 CALCUTTA 128 was relied upon by the learned counsel particularly para 13 thereof which reads as under:

> "13. In our view the addition of the defendants Nos.2, 3, 4 and 5 who are all Directors of the appellant (defendant no.1 in the Calcutta suit does not make the Calcutta suit, any the less a suit between the same parties as in the Jabalpur suit, for the purpose of Section 10 of the Civil Procedure Code."

14. The learned counsel has thereafter relied upon another judgement of Patna High Court in the case of M/s.Fulchand Motilal and another v. M/s.Manhar Lall Jetha Lall Mehta reported in AIR 1973 PATNA 196 as well as the judgement of Gauhati High Court in the case of Mahangu Prasad Shah V. Pravag Sah and others reported in AIR 1975 Gauhati 40. The learned counsel has also relied upon the judgement of Delhi High Court in the case of C.L.Tandon G.S. V. Prem Pal Singh Rawat and others reported in AIR 1978 DELHI 221 and another judgement in the case of Sagar Samsher Jung Bahadur Rana and another v. The Union of India and others reported in AIR 1979 DELHI 118. He has also relied upon the judgement of Mana v Dalel reported in AIR 1979 PUNJAB & HARYANA 39 and judgement of Jammu & Kashmir High Court in the case of Lal Din V. Suleman and Ors. reported in AIR 1987 JAMMU & KASHMIR 17. Lastly he has relied upon judgement of Madras High Court in the case of Radhika Konel Parekh V. Konel Parekh reported in

AIR 1993 Madras 90.

15. On the other hand the learned counsel for respondent no.1 has however contended that the provision of s.10 do not apply to the facts of the present case. He has contended that in the present case neither the parties to both the suits are the same nor the reliefs claimed in both the suits are the same. He has however contended that the claim of respondent no.1 in the present case as well as the claim of mother in the earlier suit is distinct and they are both claiming by virtue of their own independent right though it may be through the deceased partner. It has been contended that once the partner has expired rights vests in them in their individual and independent capacity only and it cannot be stated that the said right can be affected by the provision of s.10 as if the claim of both the parties is similar and or identical. It has been further contended that the Supreme Court has held that one of the test is to see whether the claim in the second suit would be res judicata if the first suit is decided. It has been contended that there cannot be res judicata in the present case because the claim is not the same and by

the same parties but by two different parties.

16. I have considered the argument of both the parties and the judgements which have been cited before me by the learned counsel for the petitioners in detail. The provision of s.10 in my opinion requires no interpretation because the various judgements of the Apex Court has interpreted the said section laying down the situaton and principles where the same will be applicable. I will only set out a few latest authorities of the Supreme Court dealing with the provision of s.10 and interpreting the same so as to determine whether on the facts of the present case the said section is applicable or not.

17. In the case of British Indian Corpn. Ltd. V. Rashtraco Freight Carriers reported in (1996) 4 SCC 748 while interpreting the said section 10 of the CPC the Supreme Court has held that what is required is that the cause of action in both the suits must be similar and cannot be different. In para 5 of the said judgement it has been held as under:

> "5. It is seen that the claim of the respondent in Suit No.612 of 1994 is for the recovery of the alleged dues said to be payable by the appellant-Corporation while the suit of the appellant is for recovery of the goods lawfully entrusted to and unlawfully detained by the respondent. The causes of action are entirely different. There is no common issue directly or substantially in issue in both the suits. The High Court, therefore, committed gross error of law in staying the later suit."

18. In the case of Pukhraj D.Jain and Ors. Vs. G.Gopalkrishna reported in 2004 7 SCC 251 the Supreme Court in para 4 has held as under:

> "4. We have heard learned counsel for the parties and have perused the records. In our opinion, the view taken by the High Court is wholly erroneous in law and must be set aside. The proceedings in the trial of a suit have to be conducted in accordance with provisions of the Code of Civil Procedure. Section 10 CPC no doubt lays down that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed. However, mere filing of an application under Section 10 CPC does not in any manner put an embargo on the power of the court to examine the merits of the matter. The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter

> in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the court as to how the proceedings should be conducted, it is for the court to decide what will be the best course to be adopted for expeditious disposal of the case. In a given case the stay of proceedings lf later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where a subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side."

19. In the aforesaid judgement the Supreme Court has held that one of the consideration is that there is no duplication of trial and that the rule is merely of a procedure. In the latest judgement of the Apex court in the case of National Institute of Mental Health & Neuro Sciences V. C.Parameshwara reported in (2005) 2 SCC 256 the Supreme Court has held as under:

> "The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous

> instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical."

20. In the said judgement it has been specifically held that the subject matter in both the suits should be identical. In the present case on applying the aforesaid test which is laid by the Apex Court firstly what is required to be seen is that both the suits are between the same parties and are having identical or synonymous cause of action. Considering the facts of the present case, I am of the opinion that it is not so. The first suit is filed by mother of respondent no.1 claiming her own independent right as legal heir of deceased partner. The right claimed by the mother is claimed in her own individual capacity in respect of estate of the deceased.Merely because the claim is made in respect of estate of deceased it cannot be said that the plaintiff in that suit is claiming right through the deceased. In cases where the plaintiffs on death acquired their own right then they are claiming their right in their own individual capacity and as such they

are entitled to maintain the suit in their personal capacity and not through the said deceased. Similarly the right claimed by respondent no.1 in the present suit is claimed by her in her own individual capacity. Both the parties in the first suit and second suit cannot be treated as the same parties on the ground that they are claiming through the deceased partner.

21. The cause of action in both the suit is also different. In the first suit cause of action which has been sought to be established is by the mother for her share and in the second suit cause of action is sought to be established is by respondent no.1 for her own share. Once both are claiming their individual shares it cannot be said that cause of action in both the suits is identical.

22. Now turning to the third aspect that is whether reliefs claimed are identical and whether it can be said that the issue involved in both the suits is wholly or substantially the same. It is not in dispute that prayers which are made in the present suit are much larger including the 1/4th of the total share of deceased in the partnership firm. It is also not in

dispute that the suit is also filed for accounts by the respondent no.1 whereas in the first suit no such reliefs are sought. The issue as to the accounts of the deceased partner in the firm of petitioner is not a subject matter of the issue in the first suit. Thus it cannot be said that relief sought and / or issue involved in both the suits are identical and therefore the second suit should be stayed u.s.10 of the CPC.

23. The apex court in the aforesaid judgement in the case of National Institute of Mental Health & Neuro Sciences (Supra) has laid down the two tests that the decision in first must operate as res judicata in subsequent suit and secondly where the whole of the subject matter in both the suits is identical. In my opinion neither the decision in first suit can be treated as res judicata in the second suit nor the whole issue in both the suits are identical.

24. In the light of the aforesaid fact, I am of the opinion that the impugned order does not require any interference under Article 227 of the Constitution of India and accordingly the petition fails and is dismissed. However, there shall be no order as to

costs.